UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK A. KOWALESKI CASE NO. 97-62832

Debtor Chapter 7

MARK A. KOWALESKI

Plaintiff

vs. ADV. PRO. NO. 01-80148A

CHRISTINE D. KOWALESKI

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Before this Court is an adversary proceeding commenced on September 10, 2001, by Mark A. Kowaleski ("Debtor" or "Plaintiff") by the filing of a complaint against Christine D. Kowaleski

("Defendant"), seeking a discharge of a debt owed to the Defendant pursuant to § 523(a)(5) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), or, alternatively, pursuant to § 523(a)(15) of the Code. Issue was joined by the filing of an answer by the Defendant on October 11, 2001.[1]

A trial was held in Utica, New York, on September 25, 2002, at which the Debtor appeared by counsel and the Defendant appeared pro se. Following the trial, the Court reserved its decision and granted the parties the opportunity to file additional memoranda of law no later than October 30, 2002.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), and (b)(2)(I).

FACTS

The Plaintiff and Defendant were married on July 28, 1974. Four children were born of the marriage. On March 23, 1993, the Defendant commenced an action in the Supreme Court of the State of New York, Onondaga County ("State Court"), seeking a divorce.

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[1] The adversary proceeding was initially scheduled for trial on February 11, 2002. On that date parties reached an oral stipulated resolution of the proceeding. However, on June 27, 2002, Plaintiff's counsel advised the Court that parties could not craft an agreeable written stipulation and requested that the matter be placed back on the Court's trial calendar.

On July 29, 1994, as part of the resolution of the divorce action, the parties entered into a Stipulation in lieu of a separation agreement in open court. The terms of that Stipulation, as relevant to the matters pending before this Court, are as follows: "The marital residence shall be the wifes, and she is to be responsible for payment in full of the first mortgage on that residence. . . . Mrs. Kowaleski is going to pay the first mortgage. However, as part of this stipulation, there is a home equity [loan], a second mortgage in effect, which will be paid by Mr. Kowaleski. . . . [A]s part of that stipulation, the parties are waiving any claim for maintenance from each other." At the time of the entry of the Stipulation, the balance due on the home equity loan was approximately $13,000, with a monthly payment of approximately $180. In addition, there was then a past due amount of approximately $600. The Stipulation was itself incorporated by reference into the Judgment of Divorce rendered on the same date, July 29, 1994, by the State Court.[2]

The Debtor filed a voluntary petition seeking relief pursuant to Chapter 7 of the Code on May 7, 1997. Schedule F of that petition, listing unsecured creditors with nonpriority claims, did not list the Defendant as a creditor. An Order of Discharge was issued to the Debtor on September 4, 1997, following the Court's receipt of the Trustee's Report of No Assets. On March 12, 2001, approximately 4 years later, the Debtor filed an application to reopen the case in order to include the Defendant as an additional creditor. Thereafter, on September 10, 2001, the Plaintiff filed the instant adversary proceeding, seeking to have the obligation to pay the home equity loan provided for in the

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[2]The Judgment, in relevant part, "ordered, adjudged, and decreed, that all matters regarding equitable distribution shall be as set forth in the Stipulation of the parties, made July 29, 1994, a copy of which is . . . made a part hereof." (Pl.'s Ex. 9, at 2.)

Stipulation discharged pursuant to, alternatively, Code § 523(a)(5) or (a)(15).[3]

In his complaint in the present adversary proceeding, the Plaintiff concedes that the divorce decree issued pursuant to the settlement summarized above imposed upon him the obligation to pay the home equity loan.[4] The Plaintiff further concedes that he has defaulted on such payments.[5] The Defendant has not contested either of these portions of the complaint in her answer;[6] they are thus deemed admitted. *See* Federal Rules of Civil Procedure (Fed.R.Civ.P.) 8(d), which is made applicable in bankruptcy proceedings through Federal Rules of Bankruptcy Procedure (Fed.R.Bankr.P.)7008(a); *see, also, American General Finance v. Washington*, 248 B.R. 565, 566 (8th Cir. BAP 2000). At the trial of this matter, the Defendant testified that in 1997 she refinanced the mortgage on the house and, that, in the course of that refinancing the original home equity loan from Onbank was repaid. Since that time, the Defendant has attempted to recoup that payment from the Plaintiff.

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[3]Although the Stipulation also provided for child support of $200 per week for the four children, the Debtor has not sought to have that obligation discharged.

[4]"[T]he Stipulation . . . further provided that Plaintiff would be responsible for and pay a second mortgage (home equity line of credit on [the] Residence) due and owing to Onbank & Trust Co. in the amount of $13,000.00 together with approximately $600 in arrears on said mortgage." (Complaint, at ¶ 10.)

[5]"Plaintiff seeks . . . to have this Court find that the debt owing to Onbank & Trust Co. and Defendant because of her payment of same (based upon Plaintiff's default in payment thereon) should be discharged in this proceeding . . . ." (Complaint, at ¶ 13.)

[6]"The statements in Paragrap[h] . . . 10 are not argued." (Answer, at ¶ 3.)

ARGUMENTS

The Plaintiff argues that his obligation to pay the home equity loan was part of the distribution of property portion of the Stipulation the parties entered into at the time of their divorce. The Plaintiff points out that the Stipulation provided (1) for the house to be transferred to the Defendant, (2) that she would pay the first mortgage, and (3) that he would pay the home equity loan. The Plaintiff argues that all of these are provisions that dealt with the disposition of an asset, the parties' former joint residence, and the liabilities attached to it. The Plaintiff further argues that, inasmuch as the Stipulation expressly provided that both parties waived payment of separate maintenance,[7] his obligation to pay the home equity loan cannot constitute alimony or separate maintenance; and, that, since the Stipulation otherwise provided for child support payments having no relation in their amount to the Defendant's need to continue living in the house, the obligation to pay the home equity loan cannot constitute child support. Thus, the only portion of the Judgment of Divorce to which the obligation to pay the home equity loan can logically relate is the disposition of property. The Plaintiff further contends that, since the obligation is not for alimony, maintenance or child support, it falls within the "exception to the exception" contained in Code § 523(a)(15)(A), excepting from discharge a debt incurred "in connection with a . . . divorce decree" which is neither alimony nor support nor maintenance where "the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent." The Plaintiff thus argues that his situation

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[7]See Pl.'s Exh. 10, at 23. ("[A]s part of th[e] stipulation, the parties are waiving any claim for maintenance from each other.")

is one of those excepted from the general rule making all debt incurred in connection with a divorce decree nondischargeable. The Defendant, in contrast, argues that the debt of the Plaintiff with respect to the home equity loan does constitute alimony, maintenance or child support owed by the Plaintiff. She points to the fact that, in the Stipulation, she waived her right to pursue maintenance, alimony or child support beyond the child support provided therein, in support of her contention that the financial provisions of the Stipulation, including the obligation of the Plaintiff to pay the home equity loan, constituted alimony, maintenance or child support. She also alleges that the Plaintiff never informed her of his bankruptcy proceeding until she attempted to enforce her rights under the Stipulation in State Court. The Defendant also denies the Plaintiff's contention that he does not have the ability to pay the debt, and alleges that he has received, as a result of the Stipulation, proceeds of joint savings, 401(k),[8] and pension accounts; pays no child support for the minor children for whom the Defendant has full custody; has no living expenses as he lives with his parents; and earns over $50,000 per year on a full-time basis.

DISCUSSION

A debtor in a Chapter 7 case receives a discharge "from all debts that arose before the date

[8]This is a common shorthand for a particular type of cash savings and/or deferred compensation program created by employers to permit their employees to have funds contributed directly from their salaries, on a pretax basis, to specially designated accounts. The term derives from the fact that such programs are authorized by and administered pursuant to § 401(k) of the Internal Revenue Code, 26 U.S.C. § 401(k).

of the order for relief under this chapter." Code § 727(b).

The Plaintiff, in his complaint, recites two separate causes of action: one seeking a determination of this Court that the debt arising out of the home equity loan should be discharged by this Court, as it does not constitute alimony, maintenance, or support, as set out in the exception to discharge contained in Code § 523(a)(5); and the other seeking a determination of this Court that, if it finds that the debt is of a kind set out in Code § 523(a)(15), then the debt should nevertheless be discharged because the Debtor does not possess the ability to pay this debt from income or property not reasonably necessary for the support and maintenance of the Debtor or his minor children or because discharge of the debt would result in a benefit to the Debtor that would outweigh the harm, if any, to the Defendant and/or her children.

In general, the party opposing the bankruptcy discharge of a particular debt in bankruptcy bears the burden of proving by a preponderance of the evidence that the requirements of the relevant paragraphs of § 523(a) are met. ("[T]he standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991).) Since Code § 523(a)(15) includes, however, an exception to that exception, the burden of proof is slightly different from that set forth above

> The burden of proving initially that [one] holds a subsection (15) claim against the debtor should be borne by the creditor (nondebtor/former spouse). To make that showing, the creditor must establish that the debt is within the purview of subsection (15) by demonstrating that it does not fall under § 523(a)(5) and that it nevertheless was incurred by the debtor in the course of the divorce or in connection with a divorce decree or similar agreement. Once that showing has been established,

> the burden of proving that he falls within either of the two exceptions to nondischargeability rests with the debtor. In short, once the creditor's initial proof is made, the debt is excepted from discharge and the debtor is responsible for the debt unless either of the two exceptions, subpart (A), the "ability to pay" test, or (B), the "detriment" test, can be proven by the debtor.

In re Crosswhite, 148 F.3d 879, 884-85 (7th Cir. 1998); *see also In re Williams*, 271 B.R. 449, 454 (Bankr. N.D.N.Y. 2001) (adopting this allocation of the burden of proof).[9] This allocation of the burden of proof first upon the creditor (to show that the debt is a marital debt incurred in connection with a divorce or a separation agreement which does not constitute alimony, maintenance or support), and then shifting to the debtor, has also been followed by other courts within this circuit. *See In re Rogan*, 283 B.R. 643, 647 (Bankr. D. Conn. 2002); *In re Rushlow*, 277 B.R. 216, 220-21 (Bankr. D. Vt. 2002) (adopting the allocation set forth by this court in *Williams*). Against this background of legal authority, the Court turns to a detailed consideration of the Plaintiff's two causes of action.

First Cause of Action, Seeking Discharge Pursuant to Code § 523(a)(5)

In the first cause of action stated in his complaint, the Plaintiff seeks a discharge of the debt owed to the Defendant on the basis that the exception found at Code § 523(a)(5) is inapplicable. Although that section is one that enumerates exceptions from the discharge of a debt, the Plaintiff argues

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[9]The Court notes that other courts have placed the burden of *persuasion* on the creditor, while at the same time placing the burden of *production* on the debtor, regarding the two exceptions, subparts (A) and (B). *See, e.g., In re Hadley*, 239 B.R. 433, 437 (Bankr. D.N.H. 1999). All of those courts are, however, in the 1st Circuit *See, e.g., Mayer v. Cornell University*, 909 F. Supp. 81, 86 (N.D.N.Y. 1995), *aff'd*, 107 F.3d 3 (2d Cir.), *and cert. denied*, 522 U.S. 818, 118 S.Ct. 68, 139 L.Ed.2d 30 (1997) ("this court is bound to follow [Second Circuit decisions] with all of [their] ramifications; and it is free to disregard authority to the contrary outside this Circuit.").

that it also includes an exception for debts designated as but not actually in the nature of alimony, maintenance, or support from the exception it creates generally for debt incurred in connection with a separation agreement, thereby creating an "exception to the exception."

"The apparent intent and purpose of . . . § 523(a)(5) is to prevent a debtor from discharging his responsibilities to an ex-spouse or children, even to the extent that such support was in the form of a debt to be paid to a third party." *In re Eisenberg*, 18 B.R. 1001, 1003 (Bankr. E.D.N.Y. 1982). However, "it is necessary to examine the agreement and all the circumstances surrounding the creation of the liability to determine if the debt is in the nature of alimony, maintenance or support." *Id.*

"[T]he task of the Bankruptcy Judge is to determine whether the alleged obligation (i) constitutes a 'debt,' (ii) which 'arose' prior to the bankruptcy order for relief, (iii) is 'for alimony . . . , maintenance . . . , or support . . . of [a] spouse or child . . .', and (iv) is 'in connection with a . . . divorce decree. . . .' An obligation is in the nature of alimony, maintenance or support when it is intended to provide support for the spouse." *In re Cuseo*, 242 B.R. 114, 119 (Bankr. D. Conn. 1999).

In this case, the debt in question was a debt owed to a third party, Onbank; specifically, it was in the form of a home equity line of credit on the parties' marital residence. That residence, in turn, became the sole property of the Defendant as a result of the parties' divorce decree.[10] There is no question that the obligation, though due and owing to a third party, constitutes a debt in connection with a divorce decree which arose prepetition, leaving only the question whether it is in the nature of alimony, maintenance or support. *See In re Krein,* 230 B.R. 379, 383 (Bankr. N.D.Iowa 1999). "Among the

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[10]"The marital residence shall be the wife's, and she is to be responsible for payment in full of the first mortgage on that residence." Pl.'s Exh. 10, at 3.

factors traditionally utilized by courts in divining the actual nature of an obligation imposed in a divorce decree are the following: (1) the label given the obligation in the decree, (2) the form and placement of the obligation in the decree, (3) whether the obligation terminates on death, remarriage, etc., (4) the economic disparity between the parties, (5) the length of the marriage, (6) the presence of minor children, (7) whether a traditional support award would have been adequate in the absence of the obligation in question, (8) the age, employability, and educational level of the parties, and (9) the financial resources, actual or potential, of each spouse." *In re Cuseo,* 242 B.R. at 119n.9. "The determination of whether a marital obligation contained in a separation agreement is nondischargeable alimony, maintenance or support or a dischargeable property settlement agreement pursuant to section 523(a)(5) is a matter of federal bankruptcy law." *In re Brody*, 120 B.R. 696, 698 (Bankr. E.D.N.Y. 1990), *aff'd*, 154 B.R. 408 (E.D.N.Y.), *and aff'd*, 3 F.3d 35 (2d Cir. 1993); *see also* H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 364 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6320.

Considering the above factors in the context of the case before this Court compels it to conclude that the repayment of the home equity loan was not in the nature of alimony, maintenance or support. The testimony before this Court at trial revealed that, at the time the divorce decree was entered (the relevant time for these determinations), the relative earning power of the parties weighed in the wife's favor, as she then earned approximately $110 more per week than the Plaintiff. (Pl.'s Exh. 9.) The obligation of the Plaintiff to pay this home equity loan was not affected by the death or remarriage of the Defendant. With respect to the form and placement of this obligation in the Stipulation, the mention of the home equity loan and the Plaintiff's obligation to pay it was immediately preceded by a discussion

of the disposition of the parties' joint marital residence and immediately followed by a discussion of the equitable distribution of the Plaintiff's employee savings plan and profit sharing plan, indicating that the parties considered this loan to be part and parcel of the asset distribution, rather than alimony or support. The parties' divorce decree also provided for traditional child support payments of $200 per week; testimony at trial revealed that this amount is a mere $9.84 less than the amount that would normally have been ordered based solely on the parties' relative incomes.[11] This difference is alone insufficient to account for the Plaintiff paying over $180 per month on the home equity line of credit. In addition, the parties' stipulation provided that the Plaintiff's obligation to share in the educational expenses of his children "shall be deemed added child support." (Pl.'s Exh. 10, at 11.) The parties' respective educational levels and employment also weigh in the Plaintiff's favor, as Defendant was a registered nurse and a certified neonatal nurse practitioner, whereas the Plaintiff is a truck driver. Finally, the Stipulation expressly provided that both parties waived alimony or separate maintenance. (Pl.'s Exh. 10, at 23.) In sum, virtually all of the relevant factors weigh in favor of the conclusion that the Plaintiff's obligation to pay the home equity loan was not considered by the parties at the time they executed the Stipulation, the relevant time for this Court's determination, as one in the nature of alimony, maintenance or support.

Accordingly, the first count of the Plaintiff's complaint, seeking a discharge of the debt for the home equity loan as not falling within the exception found in Code § 523(a)(5), is granted.

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[11]In fact, the testimony at trial revealed that the Plaintiff's employer withheld the $209.84 provided in the state child support tables, rather than the $200 provided in the decree.

Second Cause of Action, Seeking Discharge Pursuant to Code § 523(a)(15)

In the second cause of action stated in the Plaintiff's complaint, the Plaintiff alternatively seeks a discharge of the home equity loan pursuant to Code § 523(a)(15) because the Plaintiff does not possess the ability to pay this debt from his income or property not reasonably necessary for his support and maintenance or that of his dependents or because discharge of the debt would result in a benefit to the Plaintiff that would outweigh the harm, if any, to the Defendant and/or her children.

The Court notes, in passing, that the Plaintiff's complaint as to this cause of action was arguably subject to attack on statute of limitations grounds.[12] In this Circuit, the limitations period set forth in Fed.R.Bankr.P. 4007(c) is not jurisdictional.[13] It is well settled that, when not jurisdictional in nature,

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[12]The Debtor's ability to bring a proceeding seeking a determination of the dischargeability of a debt is circumscribed by FED. R. BANKR. P. 4007. That Rule provides, in relevant part:

> (c) Time for Filing Complaint Under § 523(c) in a Chapter 7 Liquidation . . . . A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).

Code § 523(c) in turn provides, in relevant part:

> (1) . . . [T]he debtor shall be discharged from a debt of a kind specified in paragraph . . . (15) of subsection (a) of this section . . . .

The Plaintiff's complaint is thus brought under Code § 523(c), and should have been brought, if at all, no later than 60 days after the first date set for the meeting of creditors, a date which has long since passed. Even if the 60 day period did not begin to run until a point after the Plaintiff amended his petition to add the Defendant as a creditor, he still delayed some six months before commencing the instant adversary proceeding.

[13]The Court notes that other Circuits have reached varying conclusions as to the nature of the limitations period contained in Fed.R.Bankr.P. 4007. *See In re Benedict*, 90 F.3d 50, 53-54 (2d Cir. 1996), setting forth these other conclusions. "We agree with the third line of cases and hold that the time period imposed by Rule 4007(c) is not jurisdictional." *Id*. at 54.

"filing deadlines are generally subject to the defenses of waiver, estoppel and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985) The Defendant having not raised the issue of the timeliness of this particular cause of action in her pleadings, has waived it.[14] Although the Defendant appeared in this proceeding pro se, and this Court agrees that leniency with respect to mere formalities should be extended to a pro se party, Fed.R.Civ.P. 8(c) is not a "mere formality." The failure to be knowledgeable of and raise defenses under Fed.R.Bankr.P. 4007(c) is one of the many risks run by those who seek to proceed pro se in a highly specialized area of the law.

Turning then to the merits of the Plaintiff's second cause of action, the Plaintiff seeks a discharge of the home equity loan pursuant to Code § 523(a)(15), because the Plaintiff does not possess the ability to pay this debt from his income or property not reasonably necessary for the support and maintenance of himself and his dependents or because discharge of the debt would result in a benefit to the Plaintiff that would outweigh the harm, if any, to the Defendant and/or her children.

Neither party disputes that the debt which the Plaintiff seeks to have held dischargeable is one that arose in connection with the parties' divorce decree and the settlement agreement underlying it. Further, this Court concludes that it was part of the parties' property settlement rather than in the nature

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[14]Fed.R.Civ.P.8(c), subtitled "Affirmative Defenses," states that: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c). This rule has often been held to mean that, if a party files a "pleading to a preceding pleading" (usually an answer to a complaint), and does not include an affirmative defense therein, that defense will be considered waived. 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1278, at 477 ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."). *See, e.g., Fisher v. Vassar College*, 70 F.3d 1420, 1452 (2d Cir. 1995), *aff'd en banc*, 114 F.3d 1332 (2d Cir.), *and cert. denied*, 522 U.S. 1075, 118 S.Ct. 851, 139 L.Ed.2d 752 (1997) ("Whatever the merits of this argument, the statute of limitations is an affirmative defense and can be waived.")

of alimony, maintenance or support, thus satisfying the first element of Code § 523(a)(15).

> Congress intended in the first instance that property settlements not be discharged, that debtors shouldn't use bankruptcy to do that; however, they did give the debtors the possibility of discharging the debt but only in certain circumstances. . . . If the debtor can show no ability to pay the debt [pursuant to Code § 523(a)(15)(A)], then I go no further, and the debt can be discharged. If the debtor can afford to pay the debt, then I have to do some kind of balancing [pursuant to Code § 523(a)(15)(B).

Fellner v. Fellner (In re Fellner), 256 B.R. 898, 903 (8th Cir. B.A.P. 2001).

It is at this point, however, that the Plaintiff's case simply runs out of proof. At the trial of this matter, the Plaintiff offered no evidence concerning his current financial situation – his income, expenses, assets or liabilities (other than the particular liability at issue).[15] Although he made statements regarding the parties' relative earning capacities and types of employment, those statements are not in themselves sufficient to meet his burden to "show no ability to pay the debt." This Court, thus, has no factual basis on which to make a determination that the Plaintiff is unable to pay this debt within the criteria set out in Code § 523(a)(15)(A) or (B). This Court cannot engage in speculation as to the Plaintiff's ability to pay the debt, but can only decide on the basis of credible testimony from witnesses and exhibits placed before it at a trial. The witnesses and exhibits presented here simply did not demonstrate a current inability to pay on the part of the Plaintiff. While the Court was presented with ample evidence from testimony and exhibits as to the *Defendant's* income and expenses, no similar proof was submitted as

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[15]In determining the pertinent time frame to examine Code § 523(a)(15)(A) and (B) considerations, the Court notes that while there may be a split of authority, the better rationale is that announced by the 9th Circuit Bankruptcy Appellate Panel in *In re Jodoin*, 209 B.R. 132, 141-142 (9th Cir. BAP 1997). "We agree with the bankruptcy court that the appropriate time to apply the Ability to Pay and Detriment tests is at the time of trial not at the time of filing the petition." *Id.* at pg. 142.

to the Plaintiff – his income from whatever sources, his expenses other than child support and the monthly payments on this loan, any other debts he may have, etc. Absent a determination of inability to pay the debt or the relative detriment to the parties, which the Court cannot make in the vacuum of proof existing here, the Plaintiff's second cause of action, seeking a discharge of the debt to his former spouse, the Defendant, pursuant to Code § 523(a)(15), must fail.

Accordingly, the Plaintiff's second cause of action, seeking alternatively a discharge of the debt to the Defendant under the home equity loan, pursuant to Code § 523(a)(15), is denied.

Based on the foregoing, it is hereby

ORDERED that the First Cause of Action of the Debtor's Complaint in this Adversary Proceeding, seeking a determination that Defendant's claim against the Plaintiff does not qualify as an exception to discharge pursuant to Code § 523(a)(5), is granted; and it is further

ORDERED that the Second Cause of Action of the Debtor's Complaint in this Adversary Proceeding, seeking a determination that Defendant's claim against the Plaintiff does not qualify as an exception to discharge pursuant to Code § 523(a)(15)(A) and (B), is denied; and it is therefore

ORDERED that Debtor's complaint to the extent that it seeks a judgment discharging his obligation owing to the Defendant is dismissed without costs.

Dated at Utica, New York

this 5th day of March 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge